JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 692

DEMING NATIONAL BANK, a National Banking Corporation,
Petitioner,

vs.

MORRISON FLYING SERVICE, a Montana Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Reports of the Lower Courts 2

Jurisdictional Grounds 2

Questions Presented for Review 3

Statutory Law Involved 4

Statement of the Case 6

Reasons for Granting a Writ of Certiorari 11

Point I 11

Point II 16

Point III 21

Point IV 23

Conclusion 26

Appendix—

Exhibit A—Opinion of the United States Court of Appeals, Tenth Circuit (reported at 349 F.2d 430) A1

Exhibit B—Unreported opinions of Honorable H. Vearle Payne, United States District Judge for New Mexico A6

Exhibit C—Decision of the United States Court of Appeals, Tenth Circuit (May 17, 1968) A12

Table of Cases

Abbott v. *Doane*, 40 N.E. 197, 163 Mass. 433 (1895) 23

Anderson v. *Fed. Cartridge Corp.*, 156 F.2d 681 21

Bank of Commerce & Trusts of Richmond, Va. v. *McArthur, et al.*, (CCA 5th, 1919) 156 Fed. 84 14

Briskin v. *Packard Motor Car Co.*, 169 N.E. 148, 269 Mass. 394 (1929) 23

City National Bank & Trust Co. of Salem v. *Hassler*, 9 N.J. Super. 153, 75 A.2d 546 23

Cleo Syrup Corp. v. *Coca-Cola Co.*, (CCA 8th, 1943) 139 F.2d 416, 150 ALR 1052, cert. den. (1944) 321 U.S. 781, 64 S. Ct. 638, 88 L. ed. 1074 20

Const. Co. v. O'Brien, 117 Fed. 271 (1902) 23

Dan Cohen Realty Co. v. Nat'l Savings & Trust Co., (CCA 6th, 1942) 125 F.2d 288 14

DeCicco v. Schweizer, 117 N.E. 807, 221 N.Y. 431 (1917) 23

Dry Clime Lamp Corp. v. Edwards, (CCA 5th, 1968) 389 F.2d 590 14

Federal Savings & Loan v. 1st Nat. Bank, 164 F.2d 929 .. 21

Findlay v. Fla. East Coast Ry. Co., (CCA 5th, 1932) 68 F.2d 540, cert. den. 292 U.S. 623, 54 S. Ct. 629, 78 L. ed. 1478 14

Fleming v. Munsingwear, 162 F.2d 673 21

Glens Falls Ins. Co. v. Newton Lumber & Mfg. Co., et al., (CCA 10th, 1967) 388 F.2d 66 20

Graff v. Nieberg, (CCA 7th, 1956) 233 F.2d 787 14

Graver Tank & Mfg. Co. v. Linde Air Products Co., (1950) 339 U.S. 605, 70 S. Ct. 854, 94 L. ed. 1097 19

Hicks v. Town of Hudson, (CCA 10th, 1967) 390 F.2d 84 20

Huntress v. Huntress, (CCA 7th, 1956) 235 F.2d 205 14

Joseph Lande & Son v. Wellsco Realty, 34 A.2d 418, 131 N.J.L. 191 (1943) 23

Joseph v. Danover, (CCA 9th, 1958) 261 F.2d 812 20

Keane v. Fidelity Sav. & Loan Ass'n, 22 P.2d 59, 173 Wash. 199 (1933) 23

Kelleam v. Maryland Casualty Co., (CCA 10th, 1940) 112 F.2d 940, 312 U.S. 377, 61 S. Ct. 595, 85 L. ed. 899 14

Leach v. Crucible Center Co., et al., (CCA 1st, 1968) 388 F.2d 176 20

McQuillen v. National Cash Register Co., (CCA 4th, 1940) 112 F.2d 877, cert. den. 311 U.S. 695, 61 S. Ct. 140, 85 L. ed. 450, rehear. den. 311 U.S. 729, 61 S. Ct. 316, 85 L. ed. 474 .....13, 14

Osborn v. Sinclair, 286 F.2d 832, cert. den. 366 U.S. 963 21

Re Interborough Consolidated Corp., 288 Fed. 344, cert. denied 262 U.S. 752, 67 L. ed. 1215, 43 S. Ct. 700 25

Shapiro v. *Rubens*, (CCA 7th, 1948) 166 F.2d 659 20

Shufford v. *Anderson*, (CCA 10th, 1965) 352 F.2d 755, cert. den. 383 U.S. 935 14

Spellman v. *Sullivian*, (CCA 2nd, 1932) 61 F.2d 787 13

United States v. *National Assn. of Real Estate Bds.*, (1950) 339 U.S. 485, 70 S. Ct. 711, 94 L. ed. 1007 20

United States v. *Yellow Cab Co.*, (1949) 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 150 19

Vidal v. *South American Security Co.*, (CCA 2nd, 1921) 276 Fed. 855 13

Willard v. *Hobby*, 134 F. Supp. 66 23

Wilson v. *Beard*, (CCA 2nd, 1928) 26 F.2d 860 13

Statutes

Rule 19(1)(b), Rules of the Supreme Court of the United States 2, 17

Rule 52(a), United States District Court Rules 3, 5, 15, 17, 19

28 U.S.C., Sec. 1254(1) 3

28 U.S.C., Sec. 1655 ..... 3, 4, 12, 13, 14, 15, 16

Texts

17 *Am. Jur.* 2d, Contracts, Sec. 123 21

33 *Am. Jur.*, Liens, Sec. 20 23

Sec. 84(d), American Law Institute on Restatement of Contracts 21

Vol. 2b, *Barron & Holtzoff*, Federal Practice and Procedure, p. 516 20

53 *C.J.S.*, Liens, Sec. 4b(2) 24

58 *C.J.S.*, Liens, Sec. 4b 24

Corbin, Contracts, Sec. 176 22

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a Writ of Certiorari to the United States Circuit Court, 10th Circuit, to review a judgment of that Court entered May 17, 1968, Motion for Rehearing denied July 31, 1968. A transcript of the record in the cause being duly certified by the Clerk of the Circuit Court furnished herewith in accordance with Rule 21(1) of this Court.

REPORTS OF THE LOWER COURTS

The decision of the District Court granting appellant summary judgment was rendered February 27, 1964.

The first opinion of the United States Circuit Court, 10th Circuit, concerning this cause is found at 349 F.2d 430 where said Circuit Court reversed and remanded the lower United States District Court for New Mexico's action in granting of defendant appellant's motion for summary judgment. A copy of this opinion is attached as Exhibit "A" of the Appendix. The cause was afterwards tried by the Honorable H. Vearle Payne, United States District Judge for New Mexico, sitting without a jury. A copy of Judge Payne's unreported opinions being attached hereto as Exhibit "B" of the Appendix.

Upon judgment being granted for defendant, appellant, the plaintiff appealed again to the United States Circuit Court, 10th Circuit, which reversed the judgment of the lower court. This decision was entered May 17, 1968. At this time the opinion is still unreported but is attached hereto as Exhibit "C" of the Appendix. Defendant, appellant, filed a timely motion for rehearing which was denied August 31, 1968.

JURISDICTIONAL GROUNDS

1. The Circuit Court of Appeals, 10th Circuit, rendered the decision sought to be reviewed on May 17, 1968. A timely motion for rehearing was made by defendant, appellant. The motion was denied on July 31, 1968.

2. Review of the Circuit Court of Appeals' decision is sought on two grounds:

First, review of the 10th Circuit's decision is sought under Rule 19(1)(b) of this Court on the ground there is a

real, existing, and substantial conflict in the Circuit Courts of Appeal as to the proper construction of 28 U.S.C., Sec. 1655, on the issue of whether a general creditor who has neither reduced his claim to judgment nor has an express lien or pre-existing claim to property may invoke the aid of the statute to gain jurisdiction over a non-resident defendant.

Second, review is sought on the ground of the Court's supervisory powers over the lower Circuit Court of Appeals, 10th Circuit, which has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in accordance with Rule 19 for the following reasons:

(a) The 10th Circuit has wholly disregarded the District Court's findings of fact without the slightest attempt to show they were "clearly erroneous" as required by Rule 52(a) of the District Court Rules.

(b) The Circuit Court has arrived at an inequitable result not justified by accepted concepts of law or by the pleadings.

3. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Did the New Mexico Federal District Court have jurisdiction to enter a default judgment against Cisco Aircraft, Inc., and National City Aircraft Leasing Company, both non-resident defendants, under U.S.C., Sec. 1655?

II. Did the 10th Circuit Court violate Rule 52(a) of the United States District Court Rules in reversing the lower court's decision where it was not shown the lower court's findings of fact were clearly erroneous?

III. Did the Circuit Court misconstrue the law concerning the elements necessary to establish a contract between appellant, Deming National Bank and Morrison Flying Service to pay its claim?

IV. Did the evidence produced at trial create an equitable lien in favor of Morrison Flying Service in the proceeds belonging to Cisco Aircraft held on deposit by Deming National Bank?

STATUTORY LAW INVOLVED

There are but two federal statutes material to the cause. They are as follows:

(1) *28 U.S.C., Sec. 1655.* Lien enforcement; absent defendants:

> In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.
>
> Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.
>
> If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the

property is within another district, but within the same State, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just. June 25, 1948, c. 646, 62 Stat. 944.

(2) *Rule 52* (*a*) of the United States District Court Rules:

Findings by the Court:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

STATEMENT OF THE CASE

Early in 1962, the United States Department of Agriculture through the Forest Service advertised for bids on a contract for aerial spraying of timber land in Montana. Cisco Aircraft, Inc., was the successful bidder and on April 23, 1962, entered into a contract with the Government. Mr. Monroe, President of Cisco, contacted Morrison Flying Service about furnishing gas, oil, and some chase aircraft necessary in the performance of the contract, and an oral understanding was agreed to. In the meantime, Cisco had made application to Deming National Bank for a $20,000.00 line of credit for performing its contract, and had agreed to assign its payment of the Government contract to the Bank as security for the loan but in addition was required to secure a guaranty of the loan by Mr. Monroe, and three other persons. This was done. Morrison had knowledge of the intended assignment and wrote a letter dated May 9, 1962, as follows:

"Morrison Flying Service, Helena, Montana
May 9, 1962

"Deming National Bank,
Deming, N. M.

"Dear Sir:

"It is our understanding that the Forest Service Contract for spraying forests for spruce bud-worms has been assigned to your bank. We are sub-contractors under Cisco Aircraft, furnishing gas & oil as well as 5-8 Cessna 180 aircraft to be used as chase planes. The flying contract will probably be in the $6,000-$9,000 bracket and we are wondering if your bank could send us a letter assuring us of payment for our services.

"Under our contract with Cisco, they have agreed to pay us within 48 hours of their payment of this Forest Service contract. Is this agreeable with your bank?

Yours very truly,

EMH/eh E. Morrison Herrin, President"

Before receiving the Bank's reply, Morrison entered into a written contract of May 15, 1962, with Cisco, which contract reads as follows:

"AGREEMENT

May 15, 1962

"This agreement entered into this 15th day of May between MORRISON FLYING SERVICE, INC. and CISCO AIRCRAFT, INC, of Burbank, California, for the purpose of renting eight (8) Cessna 180 type aircraft and one (1) Stearman plus Forest Service qualified pilots for all aircraft. These aircraft and pilots are to be used as stated in U.S. Forest Service Contract No. 12-11-261-2002.

"Rental for the above named airplanes with pilot, gas and oil and insurance as specified by the above numbered contract will be as follows:

"Cessna 180 & 182	$30.00 per hr.
Stearman	$85.00 per hr.

"It is further agreed that Morrison Flying Service will furnish 100 Octane gasoline for .41 per gallon, which includes Montana Tax of .01, Federal Tax of .04 and Helena Airport Tax of .01 at the Joint-City-County Airport at Helena, Montana. They further agree to furnish Aviation oil for $1.50 per gallon. Gasoline will be furnished at White Sulphur Springs for .44 per gallon which includes both the State and Federal taxes. Gasoline storage tanks and a gasoline service man will also be furnished both at White Sulphur Springs, Montana, and Helena, Montana.

Payment for all services furnished will be made as follows:

"Within 48:00 hrs. of Cisco Aircraft, Inc. receipt of payment.

CISCO AIRCRAFT, INC.
/s John H. Bowman V. Pres.
MORRISON FLYING SERVICE, INC.
/s E. Morrison Herrin
President"

On May 21, 1962. Cisco executed a written absolute assignment of the proceeds of its spraying contract to the Bank. On June 11, 1962, the Bank replied to Morrison's letter of May 9, 1962, as follows:

"Deming National Bank
122 East Pine St., P.O. Box 511
Deming, New Mexico"

D. A. Sovell
President June 11, 1962

"Mr. E. Morrison Herrin, President
Morrison Flying Service
Helena, Montana

"Dear Mr. Herrin:

"In regard to your inquiry on the Forest Service contract between U.S. Forest Service and Cisco Aircraft. This contract has been assigned to the Deming National Bank and we are to act as paying agents for all the obligations assumed under this contract.

"I can assure you that once the money is received from the Forest Service, we will pay all the bills submitted, without delay.

Yours very truly,

DJS:mjb D. J. Sovell"

Morrison commenced performance of its sub-contract with Cisco on June 21, 1962. The performance was completed on July 24, 1962. After completion, Cisco's President, Mr. Monroe, a representative of the Government, and Mrs. Herrin, President of Morrison, met in Helena, Montana and agreed to the number of hours flown by Morrison, and a statement was mailed to the Bank showing an indebtedness due Morrison of $13,560.00. Later an additional item of $464.81 was discovered and another letter was sent to the Bank. The Bank has no knowledge of receiving either letter, but if it was received, it was turned over to Cisco as were all the bills incurred on the project. Various communications later occurred between Morrison and the Bank, the substance of which was that Morrison claimed the Bank had guaranteed their bill. This fact was denied by the Bank. In the meantime, Cisco made an absolute assignment of all proceeds subject to the Bank's indebtedness and a performance bond premium of $3,168.75 to National City Aircraft Leasing Co. Prior to receiving payment of the contract proceeds on December 24, 1962, the Bank sent Morrison its letter of October 9, 1962, which reads as follows:

"Deming National Bank
122 East Pine St., P.O. Box 511
Deming, New Mexico

D. J. Sovell
President

October 9, 1962

"Luxan & Scribner
Union Bank Building
Helena, Montana

"Attn: A. W. Scribner

"Gentlemen:

"In reply to your letter of October 1, 1962, this bank was assigned the monies from the Montana Bud Worm

Contract for the repayment of monies advance by the bank for this contract. We were further advised by Mr. Zack Monroe that the monies were to be used to pay bills for the expenses of performance of the contract. However, outside of the payment of our original advancements to Mr. Monroe, no funds can be paid by this bank except upon a check bearing his signature.

"I wrote you on June 11th concerning your bill in the belief that Mr. Monroe would sign checks for the payment of your bill when the funds had been received from the Federal Government. However, since completion of the job, an assignment of all funds due Mr. Monroe was executed by him to National Leasing and we have been directed by Mr. Monroe to pay all funds over and above the monies advanced by us, and the bond premium, to the attorney for National Leasing, Mr. Merryman. Also, since that time, we have garnishments from Von Carstad. However, since the assignment to National Leasing was received by us before the garnishment by Von Carstad, it is our belief that the assignment takes precedence.

"Under the circumstances, we cannot pay any sums without the approval of Mr. Zack Monroe and his assignee, National Leasing.

"We have not as yet received any funds from the Federal Government, but unless we are restrained through legal proceedings, we will have no recourse other than to pay the funds in accordance with the assignment made by Mr. Monroe to National Leasing.

"I very much appreciate your position with regard to payment of your client's bill; however, there is nothing I can do under the circumstances but to pay the money in accordance with the above, as soon as the money is received.

Yours very truly,

DJC:mjh D. J. Sovell"

Morrison did nothing further to protect its interest in the contract proceeds, although it knew the source of payment of the monies and that other creditors had secured direct payment by the Government for their services.

On payment being received December 24, 1962, the Bank reimbursed itself, paid the bond premium, and paid National City Aircraft Leasing Service $8,536.74 on its assignment, retaining $11,999.25 because of a garnishment in that amount against the Bank.

This suit against the Bank was filed on June 26, 1962. Summary judgment was rendered in the Bank's favor on February 27, 1964. An appeal was instituted by "Morrison" to the Circuit Court which reversed the District Court, its opinion being attached hereto as Exhibit "A" of the Appendix.

"Morrison" amended its complaint, joined Cisco Aircraft, National City Aircraft Leasing Co., and the United States Government which claimed a lien on "Cisco's" funds for withholding taxes, and by amendment claimed an equitable lien on the funds held by the Bank. Subsequently trial was had by the Court of the issues and a decision and judgment was entered, the Court's memorandum decisions being Exhibit "B" of the Appendix. "Morrison" again appealed and the Circuit Court reversed the lower court by its opinion attached hereto as Exhibit "C" of the Appendix.

REASONS FOR GRANTING A WRIT OF CERTIORARI

POINT I

In the instant case, the lower 10th Circuit Court permitted a general creditor, who had neither first reduced his claim to judgment nor has an express lien or pre-existing claim to property, to proceed under the provisions of 28

U.S.C., Sec. 1655, so as to obtain jurisdiction over non-resident defendants. Before proceeding into our argument dealing with the conflict in the circuits concerning whether the above was proper, we wish to respectfully point out the 10th Circuit, by its decision of May 17, 1968, improperly re-instated default judgments entered against Cisco Aircraft, Inc., and National City Aircraft Leasing Company, Inc., rendered pursuant to 28 U.S.C., Sec. 1655.

The default judgments were improperly re-instated since no proper service of process was ever accomplished against these defendants. In the case of Cisco Aircraft, Inc., while the New Mexico District Court by order of April 14, 1966, made provision for service of process by publication over same, the record is barren of any indication whatsoever such service was made. There is no affidavit of publication filed pursuant to such order.

In the case of National City Aircraft Leasing Company, Inc., the record is also barren of any proper service of process made. No return of service was ever made by a United States Marshal and filed of record. The Court may desire to know why it is of any concern to this defendant that judgments have been improperly entered against either "Cisco" or "National City." The answer is readily apparent when it is remembered that throughout this legal proceeding this defendant has refused to pay appellee, "Morrison", on the ground the funds held on deposit by it were not its own, but instead owned, by reason of an assignment from "Cisco" to "National City" by "National City." Thus, when the 10th Circuit improperly re-instated default judgments rendered against these defendants, it, in effect, determined appellant bank's non-payment of the funds held by it was improper.

The effect of the 10th Circuit's decision was to improperly re-instate judgments by default over necessary parties

to the law suit to this defendant's detriment. With the above in mind, the Court is directed to one of the central issues of the case, which is whether a lower court may enter a judgment obtained pursuant to 28 U.S.C., Sec. 1655, where the claimant, a general creditor, has not first reduced his claim to judgment in an in personam proceeding? It is appellant's position, he may not.

This Court is properly called upon to issue a Writ of Certiorari to decide this problem due to the fact a real, existing conflict in the circuits has arisen as to the proper scope of jurisdiction granted by 28 U.S.C., Sec. 1655.

The conflict in the circuits arises out of varying constructions of what is meant by, "an action in a district court to enforce a lien upon or claim to, . . . real or personal property within the district. . . ."

The 2nd, 4th, 5th, and 6th Circuit Courts of Appeals have held a general creditor may not use Sec. 1655 to gain jurisdiction over a non-resident defendant having neither first reduced his claim to a personal judgment, nor alleged facts which would establish an express lien or pre-existing claim to property, as distinguished from an in personam action which would involve a proceeding to create for the first time a claim to the property, as the effect of the proceeding itself. In this respect see:

Vidal v. *South American Security Co.*, (CCA 2nd, 1921) 276 Fed. 855

Wilson v. *Beard*, (CCA 2nd, 1928) 26 F.2d 860.

Spellman v. *Sullivian*, (CCA 2nd, 1932) 61 F.2d 787.

McQuillen v. *National Cash Register Co.*, (CCA 4th, 1940) 112 F.2d 877, cert. den. 311 U.S. 695, 61 S. Ct. 140, 85 L. ed. 450, rehear. den. 311 U.S. 729, 61 S. Ct. 316, 85 L. ed. 474.

Bank of Commerce & Trusts of Richmond, Va. v. *McArthur, et al.*, (CCA 5th, 1919) 156 Fed. 84.

Findlay v. *Fla. East Coast Ry. Co.*, (CCA 5th, 1932) 68 F.2d 540, cert. den. 292 U.S. 623, 54 S. Ct. 629, 78 L. ed. 1478.

Dry Clime Lamp Corp. v. *Edwards*, (CCA 5th, 1968) 389 F.2d 590.

Dan Cohen Realty Co. v. *Nat'l Savings & Trust Co.*, (CCA 6th, 1942) 125 F.2d 288.

Note: Most lower District Courts are in accord with these authorities.

Contrary to the above, the 7th and 10th Circuits have permitted such suits.

In this regard see:

Graff v. *Nieberg*, (CCA 7th, 1956) 233 F.2d 787.

Huntress v. *Huntress*, (CCA 7th, 1956) 235 F.2d 205.

Kelleam v. *Maryland Casualty Co.*, (CCA 10th, 1940) 112 F.2d 940, 312 U.S. 377, 61 S. Ct. 595, 85 L. ed. 899.

Shufford v. *Anderson*, (CCA 10th, 1965) 352 F.2d 755, cert. den. 383 U.S. 935.

This Court should resolve the above conflict in the circuits. Appellants contend Sec. 1655 should be construed so as to prevent a general creditor from using the statute as a means of creating a lien or claim to property as a result of the proceeding itself. Such a construction is both logical and would prevent the inequitable results present here.

A limited construction of Sec. 1655 is logical as the Federal Courts are courts of limited jurisdiction. See the *McQuillen* case, supra. The purpose of the statute was not to create a means of serving non-resident defendants in

any action. The purpose was to create a means of clearing title ownership in property located in a district, regardless of the residence of a defendant. Here, to require a plaintiff, such as "Morrison", to first reduce his claim to judgment where he has no possible claim to the funds other than might be created by the proceeding itself would be consistent with general rule; no service unless defendant is a resident of the jurisdiction.

Here, to have first required "Morrison" to have reduced its claim to judgment would not have been prejudicial. "Morrison" could have done so in either the federal courts or the state courts. The plaintiff could have commenced legal proceedings at the defendant's residence or in Montana inasmuch as substituted service have been accomplished under state law (see Montana Rules 4D).

A restrictive construction of Sec. 1655 would not have allowed the inequitable result of this case to arise. Reason: plaintiff would have had to establish the validity of his underlying claim for compensation from "Cisco" and priority to "National City's" assignment in an in personam proceeding before commencing suit against a defendant's property pursuant to Sec. 1655. Here, these issues were never litigated. In this respect, all the court decided was that plaintiff was entitled to the property held by appellant Bank. How, in any sense of justice, can it be said to be fair and equitable to require a non-resident defendant to come in and defend himself in some distant court so as to protect his property located there? It cannot! This especially is true when it is remembered the instant defendants "Cisco" and "National City" were not doing business in New Mexico. Their only tie to that state arose because they had deposited in a national bank, pursuant to an assignment which arose prior to plaintiff's claim, the proceeds of a Government contract.

In allowing plaintiff to proceed against these non-resident defendants pursuant to Sec. 1655, the 10th Circuit placed appellant Bank into a position which it was unable to properly defend. The 10th Circuit, in effect, forced appellant to either come in and defend not only its case, but also that of defendant's "Cisco" and "National City" or to be confronted with a determination it owed more money to plaintiff than it had on deposit. Such, in fact, is the result of the case.

It should be remembered the funds belonged to the Bank's depositor "Cisco", except for the amount of the Bank's loan. The Bank was forced with an assignment, valid on its face, from "Cisco" on the one hand, and on the other hand was confronted with a claim by "Morrison", for services which were unliquidated, the validity of which the Bank had no knowledge. How can it be held to be equitable to force the Bank to defend an action brought pursuant to Sec. 1655 under such circumstances? It cannot. It would seem just to have first required the plaintiff to have reduced his claim to judgment, before allowing him to proceed under Sec. 1655. This is especially so, when the purpose of the proceeding was to establish for the first time a claim to property.

POINT II

The 10th Circuit violated Rule 52(a) of the United States District Court Rules when it summarily reversed the lower court without first showing the District Court's findings of fact to be "clearly erroneous." See Rule 52(a), supra, which indicates, "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the present case, the sole reference by the 10th Circuit to the District Court's findings is confined to the following:

> "Actually, we find little conflict in the evidence adduced at the trial."

The 10th Circuit then proceeds to ignore the lower court's findings so that it may arrive at the result which it desired. Rule 52(a) was enacted so as to prevent such a result!

In this respect, this Court is called upon to exercise its supervisory powers granted to it by Rule 19(1)(b) of this Court and to thereby issue a writ of certiorari. Not only does this Court have a basis to issue such a writ, but there is a real need for it to do so in preventing the misapplication of accepted standards of justice.

It seems inopportune to go into at any great length the fact the trial court's findings were supported by ample, substantial evidence. What should be pointed out is the 10th Circuit substituted its own findings for the trial courts without even attempting to show the lower courts were clearly erroneous. Such conduct is expressly contrary to Rule 52(a) of the District Courts.

The Circuit Court held that the performance of the contract was beneficial to the Bank and this benefit constituted consideration for its agreement to pay. The Court failed to say how it was beneficial, but if it meant that performance of the contract between "Cisco" and "Morrison" was a benefit, this was directly contrary to the lower court's findings, Nos. 8, 9, and 10 to the effect that in making its loans to "Cisco" it relied on the financial statements, signatures on the note, and the three individual guarantors of such loans.

The Circuit Court further stated that " 'Morrison' suffered a detriment in going forward with performance rather than refusing to perform because of the questionable financial condition of 'Cisco' or seeking an extraordinary means of insuring payment prior to performance." This was contrary to the lower court's finding No. 13 wherein the trial court found:

> "It is true that plaintiff did not commence work until after June 11, 1962, but there was no evidence that it was waiting to hear from the Bank before performing. The plaintiff was already obligated to perform. The only detriment that the plaintiff could have suffered would have been that it could have applied to the Forest Service to pay the plaintiff direct, but there was no testimony that the Forest Service would have done that or that plaintiff suffered any damage or detriment as a result of the letter from the Bank."

It is also contrary to finding No. 14 that "Morrison" did not suffer any direct detriment; and that no reliance by "Morrison" on the Bank's letter was established. Furthermore, the Circuit Court's finding is contrary to the evidence which clearly showed that Mrs. Herrin had no reason to question the financial condition of "Cisco" until it had already commenced performance of its contract.

The Circuit Court's misunderstanding of the law concerning consideration for any agreement between the Bank and "Morrison" is discussed more fully in our Point III, infra.

The 10th Circuit further found the Bank's letter of June 11th constituted an express agreement the Bank would pay "Morrison" out of the proceeds of the Government contract. This is in direct opposition with the trial court's findings of fact, Nos. 11, 12, and 15. These findings may be summarized as holding the Bank, by its letter, intended to act as a paying agent; that the Bank had no authority

to pay any bill except as might be authorized by "Cisco"; and that the Bank did not promise to pay any bills from its own funds.

Needless to say the purpose of Rule 52(a) was to prevent such a radical overturning of the trial court's findings of fact without first establishing same were clearly erroneous. This is especially so where, as here, the lower court's findings took into account the truthfulness and demeanor of the witnesses.

The number of cases on this point is voluminous, but the Court is directed to a few of them, one of which is *United States* v. *Yellow Cab Co.*, (1949) 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 150, wherein Justice Jackson stated:

> "Findings as to design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends."
>
> ". . . While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion, either way, but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the evidence is not clearly erroneous."

And, *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, (1950) 339 U.S. 605, 70 S. Ct. 854, 94 L. ed. 1097, wherein it is stated:

> "A finding of equivalence is a determination of fact. Proof can be made in any form: Through testimony of experts or others versed in the technology; by docu-

ments; including tests and treatises; and, of course, by the disclosures of the prior act. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. . . ."

See also:

United States v. *National Assn. of Real Estate Bds.*, (1950) 339 U.S. 485, 70 S. Ct. 711, 94 L. ed. 1007.

Joseph v. *Danover*, (CCA 9th, 1958) 261 F.2d 812.

Cleo Syrup Corp. v. *Coca-Cola Co.*, (CCA 8th, 1943) 139 F.2d 416, 150 ALR 1052, cert. den. (1944) 321 U.S. 781, 64 S. Ct. 638, 88 L. ed. 1074.

Shapiro v. *Rubens*, (CCA 7th, 1948) 166 F.2d 659.

Hicks v. *Town of Hudson*, (CCA 10th, 1967) 390 F.2d 84.

Leach v. *Crucible Center Co., et al.*, (CCA 1st, 1968) 388 F.2d 176.

Glens Falls Ins. Co. v. *Newton Lumber & Mfg. Co., et al.*, (CCA 10th, 1967) 388 F.2d 66.

Since the lower court's findings of fact were not shown to be erroneous they must stand. Having stated this, one is led to an inescapable conclusion the 10th Circuit's decision must be reversed and the district court's decision reinstated.

As an adjunct to this problem, appellant desires to point out that "Morrison" nowhere challenged the lower court's findings as being unsupported or erroneous. As is stated in Vol. 2b, *Barron & Holtzoff, Federal Practice and Procedure*, page 516:

"Where the findings of the trial court are not challenged on appeal, the reviewing court is concerned only with the legal conclusions to be drawn from the facts as found."

Osborn v. *Sinclair*, 286 F.2d 832, cert. den. 366 U.S. 963.
Fleming v. *Munsingwear*, 162 F.2d 673.
Federal Savings & Loan v. *1st Nat. Bank*, 164 F.2d 929.
Anderson v. *Fed. Cartridge Corp.*, 156 F.2d 681.

Thus, it is clear the findings of fact must stand. This Court should exercise its power to supervise the lower court and alleviate an inequitable result not based on accepted judicial standards.

POINT III

The Court of Appeals based its decision in this case on its belief that "Morrison's" performance of its contract with "Cisco" constituted a good and sufficient consideration to support the promise of the Bank to pay. In support of what they consider to be the best view of the law, they quote Sec. 84(d) of the American Law Institute on Restatement of Contracts.

We have no quarrel with the Restatement except to say that it is extremely general and that in applying it, the Court of Appeals has been led into a misconception of the law and of its meaning. Sec. 84 is silent on whether there should be knowledge of an intended non-performance of the obligor prior to, and as an inducement to, the making of the promise. All cases we have read which allow such a promise to be supported by consideration are cases which involve an independent promise after there is knowledge of an intended rescission or non-performance. Such is the rule laid down by 17 *Am. Jur. 2d*, Contracts, Sec. 123, cited by the Circuit Court, even though that court failed to understand the distinction. Thus, we say, until the promisor has some knowledge the contract might not be performed, he receives no benefit for his promise; there is no bargain where the promisee only does what he intended

to do anyway. This is borne out by what Professor Corbin says at Sec. 176:

> "The performance is *bargained for,* it is beneficial to the promisor, the promisee has *forborne,* to seek a rescission or discharge from the third person to whom the duty was owed." (Emphasis ours.)

What we believe is meant both by the authors of the Restatement and Professor Corbin and which was misconstrued by the 10th Circuit, is the promisor receives a benefit when he, by his promise, induces a performance which he does not otherwise expect. If he had no reason to suspect a rescission or non-performance, how is he benefited; the promisee receives a detriment when he gives up his right of rescission or non-performance in reliance on the promise of the third party. (This implies not only he expects to rescind or not to perform, but in some way the promisor must know of this expectation and induce him not to rescind or not to perform.)

None of the cases cited by the 10th Circuit nor read by ourselves have found consideration for a third party's performance unless the promisee either had declined to perform or the third party knew of his intention not to perform prior to making his promise. Such a situation is wholly lacking in our case. Not one shred of evidence was produced to show that the Bank had any knowledge "Morrison" did not intend to perform prior to sending its letter of June 11, 1962. The mere fact that after "Morrison" wrote its letter of inquiry of May 9, 1962, to the Bank and it later on May 15, 1962, entered into a written contract with "Cisco" we believe shows conclusively "Morrison" had no intention of not performing when it wrote to the Bank. This is what the District Court found in findings of fact Nos. 13 and 14. What Mrs. Herrin may have decided later

after receiving the Bank's letter would of course be immaterial.

Every case cited by Professor Corbin as supporting a consideration for a third party's promise, involved an independent promise by a third party after he had knowledge the contract was not to be performed.

See:

Abbott v. *Doane,* 40 N.E. 197, 163 Mass. 433 (1895).

Joseph Lande & Son v. *Wellsco Realty,* 34 A.2d 418, 131 N.J.L. 191 (1943).

DeCicco v. *Schweizer,* 117 N.E. 807, 221 N.Y. 431 (1917).

Keane v. *Fidelity Sav. & Loan Ass'n,* 22 P.2d 59, 173 Wash. 199 (1933).

Const. Co. v. *O'Brien,* 117 Fed. 271 (1902).

Briskin v. *Packard Motor Car Co.,* 169 N.E. 148, 269 Mass. 394 (1929).

Also see:

Willard v. *Hobby,* 134 F. Supp. 66.

City National Bank & Trust Co. of Salem v. *Hassler,* 9 N.J. Super. 153, 75 A.2d 546.

Cited and distinguished in our brief to the Circuit Court.

POINT IV

As to the part of the decision of the Circuit Court which held that the letters between the Bank and "Morrison" created an equitable lien which became effective as soon as the Government paid the money to the Bank, see 33 *Am. Jur.,* Liens, Sec. 20, where it is stated:

> "In order to create an equitable lien by agreement it is essential that the property or fund sought to be

charged be distinctly appropriated to or as security for the payment of the debt or other liability in question. A mere expectation, *or even an agreement, that a debt will be paid out of a particular fund, a mere promise by a debtor to pay a debt out of a particular fund due him, as soon as he receives it,* and a promise to pay a certain debt out of the proceeds of the sale of certain property *have been held respectively, not to be a sufficient appropriation to create a lien thereon.*" (Emphasis ours.)

If, as argued in our point III, there was no consideration for the agreement by the Bank to pay, then there could be no equitable lien by express contract; for as stated at 58 *C.J.S.*, Liens, Sec. 4b:

"An equitable lien may arise from an express contract based on a valuable and adequate consideration. As a general rule any express executory contract whereby one party clearly indicated an intention to charge or appropriate some particular property, real or personal, therein described or identified, as security for a debt or other obligation, or whereby one party promises to assign, convey, or transfer the property as security for such a debt or obligation creates an equitable lien on the property as indicated. *An intention to create a charge or lien on the property must clearly appear, from the language of the instrument and the attendant circumstances, strict proof of such intention being required.*" (Emphasis ours.)

The inquiry naturally follows, does the Bank's letter of June 11, 1962, show an intention to charge a lien on the monies to be received from the government? We say it does not. It may indicate an intent to pay therefrom but how can a lien or security be implied from the Bank's letter. As stated at 53 *C.J.S.*, Liens, Sec. 4b(2):

"It is also essential that the contract make a distinct appropriation of the fund pro tanto, either by giving

> an order thereon or by otherwise transferring it in such manner as in effect to constitute an equitable assignment and authorize the holder of the fund or property to pay the amount directly to the creditor."

The Bank's letter is void of any verbiage which would set aside a specific part of the Government's payment for "Morrison", nor does the letter indicate any definite amount to be set aside. As is clearly indicated in *Re Interborough Consolidated Corp.*, 288 Fed. 344, cert. denied 262 U.S. 752, 67 L. ed. 1215, 43 S. Ct. 700, there must be an agreement that specific property be segregated and held to secure the debt which they could have taken possession of to secure their claims.

By what stretch of the imagination can you say the wording of the Bank's letter of June 11, 1962, "I can assure you that once the money is received from the Forest Service, we will pay *all* the bills submitted without delay," constitutes a segregation of any part of the money for "Morrison" such that they could have taken possession of it. How can you say these words show an intention to create a lien or security? If so, what part of the fund was segregated? In what amount; the $6,000-$9,000 mentioned in "Morrison's" letter of May 9, 1962? Certainly it could not have been the $14,424 plaintiff is now claiming and to which the Circuit Court held an express equitable lien existed.

It should be noted that there are three factors in this case which distinguished it from an ordinary equitable lien case:

1. The Bank was not the owner of the fund and was promising to pay another's obligation from monies not belonging to the Bank.

2. The Bank's promise was not to pay just "Morrison's" bill, but *"all"* bills.

3. The only amount contemplated by the parties was a $6,000-$9,000 bill—which the Bank has the money to pay.

For the above reasons we feel that the Circuit Court has misconstrued the law applicable to equitable liens and should not have concluded that such a lien existed in favor of "Morrison."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BENJAMIN M. SHERMAN
PAUL F. SHERMAN

By: .....

210 South Silver Avenue
Deming, New Mexico 88030
Attorneys for Deming National Bank

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
JANUARY TERM, 1965

MORRISON FLYING SERVICE, a Montana corporation,
Appellant,
vs.
DEMING NATIONAL BANK, a national banking corporation,
Appellee.
} Number 7750

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

A. W. Scribner of Risken & Scribner (Garland & Martin on the brief) for Appellant;

Benjamin M. Sherman for Appellee.

Before MURRAH, Chief Judge, BREITENSTEIN and HILL, United States Circuit Judges.

HILL, Circuit Judge.

This appeal is from an order of summary judgment entered by the court below in favor of defendant-appellee and against plaintiff-appellant. The controversy is over the right of appellant, Morrison Flying Service (Morrison), to recover from appellee, Deming National Bank (Bank), for services performed by it under a subcontract with Cisco Aircraft, Inc. (Cisco).

The facts giving rise to the dispute are as follows: On April 23, 1962, Cisco entered into a contract with the United States Department of Agriculture, under the terms of

which it agreed to spray, from the air, approximately 500,000 acres of national forest land located in the State of Montana. In return for these services, Cisco was to receive an agreed upon price payable upon completion of the aerial spraying operations in a manner satisfactory to the Government. Thereafter, Cisco contacted Morrison and requested it to provide search planes, pilots and other services to be used in performing the aerial spraying contract. On May 15, 1962, Morrison agreed to this and Cisco agreed to pay it a sum equal to $30 per airplane for each hour of service, which was to be paid within 48 hours after Cisco had received payment under its contract with the Government.

Morrison alleges that before commencing performance of the subcontract, it received information to the effect that Cisco had assigned, or was going to assign, the proceeds due on the aerial spraying contract with the Government to the Bank. It therefore wrote a letter to the Bank stating it understood such an assignment had been made and inquiring as to whether the provision in its contract with Cisco requiring payment within 48 hours was agreeable with the Bank.[1] In fact, Cisco did execute an "Instrument of Assignment" on May 21, 1962, in which it assigned to the Bank, all sums of money then due and to become due under the contract with the Government. The

1. That letter reads as follows:

"It is our understanding that the Forest Service Contract for spraying the forests for spruce bud-worm has been assigned to your bank. We are sub-contractors under Cisco Aircraft, furnishing gas & oil as well as 5-8 Cessna 180 aircraft to be used as chase planes. The flying contract will probably be in the $6,000-$9,000 bracket and we are wondering if your bank could send us a letter assuring us of payment for our services.

"Under our contract with Cisco, they have agreed to pay us within 48 hours of their payment of this Forest Service contract. Is this agreeable with your bank?"

assignment was apparently given to the Bank as security for advancements of funds which the Bank had already made, or would in the future make, to Cisco.[2] On June 11, the President of the Bank replied to Morrison's letter stating that the Bank was acting as paying agent for all obligations assumed under the Government contract and assured Morrison that once the contract proceeds were received, the bills would be paid.[3]

Thereafter and allegedly in reliance upon this communication from the Bank, Morrison fully performed all of the obligations imposed upon it by its subcontract with Cisco and, as a result, Cisco became indebted to it in the amount of $14,424.81. On December 24, 1962, the Government paid to the Bank the entire proceeds due Cisco under the aerial spraying contract in the amount of $44,784. When Cisco refused to pay for its services, Morrison demanded payment from the Bank and this demand was also refused. Morrison then commenced this action against the Bank alleging that, by its letter of June 11, the Bank had guaranteed payment to it for the services performed under its subcontract with Cisco and prayed for judgment against

---

2. The assignment provides, in part, as follows:

"Assignor [Cisco] covenants that Assignor will receive all moneys advanced hereunder by the Bank as a trust fund to be first applied to the payment of claims of laborers, material men, subcontractors, and of other expenditures arising out of the performance of said contract, and until such payments have been made Assignor will not use any part of said advances for any other purpose * * *."

3. The letter states:

"In regard to your inquiry on the Forest Service Contract between U.S. Forest Service and Cisco Aircraft. This contract has been assigned to the Deming National Bank and we are to act as paying agents for all the obligations assumed under this contract.

"I can assure you that once the money is received from the Forest Service, we will pay all the bills submitted, without delay."

the Bank in the amount of those services. The Bank's answer denied that payment had been guaranteed to Morrison and asserted certain other defenses. With issues thus joined, Morrison attempted to take the deposition of the President of the Bank. During the course of the deposition, the Bank's president refused to answer certain questions propounded to him by counsel for Morrison and it thereafter filed a motion to compel the witness to answer those questions. The Bank then filed a motion for summary judgment which the lower court granted without ruling upon the motion to compel the witness to answer the questions asked in the deposition. Morrison appeals.

We agree with the trial court and with appellee in that the letter of June 11 did not, in and of itself, constitute a guaranty of payment because of a lack of consideration. It was, in and of itself, a promise to pay but regardless of that promise, insofar as the present record discloses, Morrison was already obligated to perform the subcontract with Cisco and, after receipt of the letter, did only what it had contracted to do. However, the conclusion as to consideration does not dispose of the controversy. Rather, we are concerned with the entering of a summary judgment at a stage of the case when all of the facts and circumstances material to a just determination of the controversy were not before the court.

Morrison had pending before the court, on the date the summary judgment was entered, a motion to compel the President of the Bank to answer certain questions propounded to him in the course of the taking of his deposition by Morrison, and which he had refused to answer. These questions pertained to the various financial dealings between Cisco and the Bank, correspondence between the Government and the Bank concerning the Cisco contract

with the Government and the manner in which the Bank disbursed the proceeds of the assigned contract. We do not conclude that these questions must be answered or that, if answered, they will finally permit Morrison to prevail in the case. The trial court should first have an opportunity to rule upon the matter. Nevertheless, some of this evidence may be very material for a final disposition of the litigation. It should be noted that Morrison alleges in the complaint: Its contract with Cisco was made on May 15, 1962, and it was to receive payment from Cisco within 48 hours after Cisco was paid by the Government; Cisco assigned the proceeds from the government contract to the Bank on May 21; and it did not commence performance of its contract with Cisco until after it received the June 11 letter from the Bank and then only by reason of its reliance upon the Bank's promise to pay. If the evidence, as eventually adduced, shows a factual situation whereby Morrison had legal grounds to abstain from performance of its contract with Cisco until it had assurance of being paid and that Morrison's performance of the contract constituted a benefit to the Bank, consideration may well be found to exist.

Moreover, Morrison may be able to prove a case under some legal theory other than guaranty. Its proposed theories of promissory estoppel and constructive trust are sufficiently alleged in the complaint and they, or some other legal or equitable theory, may find factual support from evidence available but not before the court at the time summary judgment was granted.

It is, of course, the duty of the trial court to grant a motion for summary judgment in an appropriate case but such relief is drastic and should be applied with caution to the end that litigants will have a trial on bona fide factual issues. Bushman Construction Company v. Conner, 10 Cir.,

307 F.2d 888. In determining whether to grant the motion, the court must consider the case as a whole, including the allegations of the complaint as well as the affidavits and other evidence before it. Bushman Construction Co. v. Air Force Academy Housing, Inc., 10 Cir., 327 F.2d 481; Thompson v. United States, 10 Cir., 312 F.2d 516, cert. denied, 373 U.S. 912. And, it should not be granted where, as here, there are genuine issues of fact to be determined. United Mine Workers of America, District 22 v. Roncco, 10 Cir., 314 F.2d 186, and cases therein cited.

The order granting summary judgment is REVERSED and the case is REMANDED for further proceedings.

EXHIBIT "B"

UNITED STATES DISTRICT COURT
District of New Mexico
Albuquerque, New Mexico 87103

H. Vearle Payne
Chief Judge

Howard C. Bratton
Judge

December 22, 1966

Mr. Benjamin M. Sherman
Post Office Box 850
Deming, New Mexico 88030

Messrs. Garland & Martin
Post Office Box 269
Las Cruces, New Mexico 88001

Re: Morrison Flying Service v.
Deming National Bank - No. 5374 Civil

Gentlemen:

I need not set out the substance of the testimony, nor of the exhibits, in this letter since you are all familiar with them. There is no question but what Mrs. Herrin

wrote to the bank on May 9, 1962. The contents of that letter are familiar to all of you. The bank answered the letter on June 11, stating:

> "We are to act as paying agents for all the obligations assumed under this contract.
>
> "I can assure you that once the money is received from the Forest Service, we will pay all the bills submitted without delay."

It is my opinion that this is not a promise of the bank to pay the account from its own funds but it is a promise to act as the paying agent and to pay Morrison Flying Service when the bank received the money from the Forest Service. However, before the letter was received by Mrs. Herrin, Morrison Flying Service entered into a contract with Cisco Aircraft, Inc., which contract was dated May 15, 1962. This was nearly a month before the letter was received. She became legally obligated to perform before ever hearing from the bank, so that the contract which she entered into was not entered into with reliance upon what the bank had said.

The actual spraying of the trees was not commenced until after June 11, but there is no evidence that anyone was waiting to hear from the bank before performing. Mrs. Herrin did state that she was relying on the letter. I do not believe she was relying on the bank to pay from its own funds. However, she had already entered into the contract and was legally obligated to perform. The narrow question is whether or not the law concerning promissory estoppel should be applied to this situation. The only basis would be that she testified that she could have applied to the Forest Service to pay her direct. There was no testimony that they would have paid her direct but there is testimony that they did pay some other people direct.

I do not believe a person can recover on the doctrine of promissory estoppel where the only thing they can allege is that after signing the contract but before performance they might have applied to some third party for payment of the bill rather than looking to the party with whom they contracted. Mrs. Herrin did not contract with the Forest Service. She contracted with Cisco Aircraft Company. The only detriment which she can claim is that she might have gotten someone else to pay for the services rather than looking to Cisco. Since Morrison Flying Service contracted directly with Cisco, before receipt of the letter, and did not rely on the letter in entering into the contract, I do not believe that the doctrine of promissory estoppel would apply.

There is no evidence that the delay in performing the contract was by reason of waiting for an answer from the bank. Any delay was no doubt for some other reason. Mrs. Herrin didn't wait to sign until she heard from the bank, nor was performance conditioned on hearing from the bank. In other words, she did not really rely on the bank.

There is no showing that the bank was relying on Morrison to fill the contract or that what was done by Morrison was necessary to protect the bank. The bank had three sureties on the notes from Cisco besides the financial statement, and the evidence is that the bank relied on those matters and not on Morrison Flying Service in any way.

I was unable to find anything which constituted the bank a trustee of the funds in question.

During the trial I asked the parties whether or not the law was such that the funds in question could be claimed by the plaintiff against Cisco Aircraft Company, and I was assured that such was the law. I have carefully

read 28 U.S.C. 1655, and it is my opinion that this section does not cover an ordinary debtor-creditor suit. It only applies when the plaintiff is actually claiming the property as belonging to it by something which occurred prior to the suit other than the debtor-creditor relationship. I don't believe that an ordinary creditor can come in and subject the property to his claim under the section mentioned. I refer the parties to the various cases in the notes to the section, which clearly point this out. I also refer to the last sentence of the section in which a party who is not served may come in at any time within a year and set aside the judgment on payment of costs, and have the court proceed to determine its rights. In other words, I do not believe that plaintiff has any right to a judgment against Cisco in this proceeding in order to reach the funds in the bank.

I do not suppose that we reach the question, but I did not feel that the bank was entitled to claim attorney fees involved in this case by virtue of the assignment from National Leasing. That may have to wait another day, but I do not believe that the bank was justified in claiming attorney's fees by virtue of any provision in that assignment, except such attorney's fees as may have been directly connected with that assignment or growing out of it.

Also we do not reach the question of interest in this case since I do not believe that 28 U.S.C. 1655 permits the plaintiff to reach the funds in question.

It does appear to me that the Government's claim of lien would be enforceable and should be allowed.

Sincerely,

/s/ H. Vearle Payne

UNITED STATES DISTRICT COURT

District of New Mexico

Albuquerque, New Mexico 87103

H. Vearle Payne
Chief Judge

Howard C. Bratton
Judge

January 17, 1967

Messrs. Garland, Martin & Martin
201 East Griggs Street - P. O. Box 269
Las Cruces, New Mexico 88001

Messrs. Risken & Scribner
415 Power Block - P. O. Box 225
Helena, Montana

Mr. Benjamin M. Sherman
Post Office Box 850
Deming, New Mexico 88030

Honorable John Quinn
United States Attorney
Attention of Mr. Campbell
P. O. Box 607
Albuquerque, New Mexico

Re: Morrison Flying Service v.
Deming National Bank - No. 5374 Civil

Gentlemen:

I do not construe the Huntress case (235 F. 2d 205) the way that counsel construe it. Nor do I construe the second amended complaint in this case to allege any ownership of or lien upon the bank account in question.

I realize that there is a conclusion in the second amended complaint that plaintiff is the true and rightful owner of the account, but the facts of the case brought out at the

trial are to the effect that the plaintiff is a general creditor of Cisco. Count II is an allegation to the effect that the plaintiff is a general creditor.

Count III alleges that an assignment was made of the funds from Cisco to National City Aircraft Leasing Company, and an allegation that the assignment was without consideration and void. There is the conclusion that the fund is owned by the plaintiff, but there are no facts to substantiate them and there were no facts during the trial to substantiate it.

This entire question is fully annotated in 30 A.L.R. 2nd 208 et seq.

It appears to the Court that there are many cases from both the lower courts and the appellate courts which hold that general creditors cannot use Sec. 1655 to reach funds within the jurisdiction of the court. I won't take time to go through the cases mentioned because they are numerous.

The Court is of the opinion that the section in question does not give it any jurisdiction to enter a judgment in favor of the plaintiff against the funds in question. There was no antecedent lien or claim to the funds.

It would be useless for me to discuss the section and the annotations at length in this letter, but I do not believe that plaintiff can use the section for a general creditors' suit and attempt to find property of the debtor within the district.

Accordingly the judgment cannot be entered subjecting the funds to the claims of the plaintiff.

Sincerely,

/s/ H. Vearle Payne

EXHIBIT "C"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH, 1968, TERM

MORRISON FLYING SERVICE, a Montana corporation,
Appellant,

vs.

DEMING NATIONAL BANK, a national banking corporation; CISCO AIRCRAFT, INC., a corporation; and NATIONAL CITY AIRCRAFT LEASING CO., a corporation,
Appellees.

UNITED STATES OF AMERICA,
Intervenor and Appellee.

} Number 9547

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

A. W. Scribner, Helena, Montana, (Garland, Martin & Martin, Las Cruces, New Mexico, on the brief) for Appellant;

Benjamin M. Sherman, Deming, New Mexico, for Appellee, Deming National Bank;

Marco S. Sonnenschein, Attorney, Department of Justice, Washington, D. C., (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson and Crombie J. D. Garrett, At-

torneys, Department of Justice, Washington, D. C., on the brief) for Appellee and Intervenor, United States of America.

Before MURRAH, Chief Judge, HILL, United States Circuit Judge, and CHRISTENSEN, United States District Judge.

HILL, Circuit Judge.

This controversy is here for a second time. In the first appeal we reversed the trial court on an order entered granting the Bank a summary judgment.[1] At that stage of the case Morrison was only seeking a judgment against the Deming National Bank upon the grounds recited in our former opinion. After remand, by Amended Complaint, Morrison pleaded additional causes of action against the Bank, Cisco Aircraft, Inc., and National City Aircraft Leasing Company, claiming a prior equitable lien upon the contract proceeds still held by the Bank superior to any claim by Cisco or National City to such funds. Service was procured upon Cisco and National City under 28 U.S.C. § 1655. Neither Cisco nor National City answered or appeared and default judgments were entered against each of them, adjudging that appellant's claim to the contract proceeds held by the Bank was prior to any claim of either Cisco or National City to such proceeds. Appellee, United States of America, intervened in the § 1655 phase of the case and claimed a prior lien upon the contract proceeds in the hands of the Bank by reason of income taxes owed by Cisco. Trial was had to the court and a judgment was entered in favor of the Bank and a determination made that the action was not within the purview of 1655. The default judgments against Cisco and National City were thereafter set aside. The trial court also decreed that the

1. Morrison Flying Service v. Deming National Bank, 10 Cir., 349 F.2d 430.

intervenor had a prior lien for taxes upon the contract proceeds. This appeal by Morrison followed.

Actually, we find little conflict in the evidence adduced at the trial. Early in 1962, the United States Department of Agriculture through the Forest Service advertised for bids on a contract providing for the aerial spraying of timber land in Montana. Cisco Aircraft, Inc., became a prospective bidder. Mr. Monroe, President of Cisco, contacted appellant about furnishing gas, oil and some of the chase aircraft necessary in the performance of the contract. On April 23, 1962, Cisco and the government entered into a contract for the spraying work. A short time later Cisco and Morrison reached an oral understanding about Morrison's participation in the contract and on May 15 the parties evidenced the oral understanding by a written agreement. Prior to this date, Mrs. Herrin, President of Morrison, had knowledge that Cisco either had assigned or would assign the proceeds of the contract to the Deming National Bank and that the Bank would finance Cisco on the project. On May 9, she wrote the Bank concerning possible arrangements whereby the Bank would pay Morrison when it completed its part of the contract[2] and the

---

2.

"Morrison Flying Service, Helena, Montana,
May 9, 1962

"Deming National Bank,
Deming, N.M.

"Dear Sir:

"It is our understanding that the Forest Service Contract for spraying the forests for spruce bud-worms has been assigned to your bank. We are sub-contractors under Cisco Aircraft, furnishing gas & oil as well as 5-8 Cesna 180 aircraft to be used as chase planes. The flying contract will probably be in the $6,000-$9,000 bracket and we are wondering if your bank could send us a letter assuring us of payment for our services.

"Under our contract with Cisco, they have agreed to pay us within 48 hours of their payment of this Forest Service contract. Is this agreeable with your bank?

Yours very truly,
E. Morrison Herrin, President"

EMH/eh

Bank did not reply to that letter until June 11.[3] On May 21 Cisco had executed a written absolute assignment of the proceeds of the contract to the Bank. Performance of the contract was not commenced until June 21 and was completed July 24. On that date and after completion, Cisco's President, Mr. Monroe, a representative of the government and Mrs. Herrin met in her office in Helena, Montana, and agreed in writing as to the amount due Morrison and addressed such writing to the Bank and it was mailed. Mrs. Herrin later discovered an additional item of $464.81 and so advised the Bank. Various conferences and communications between Morrison and the Bank followed but the Bank did not receive the contract proceeds until December 24. Prior to this date, Cisco authorized in writing payment by the Bank of a bond premium in the amount of $3,168.75 and attempted to assign the remainder of the contract proceeds not then received by the Bank to National City Aircraft Leasing Co.

3.

"Deming National Bank
122 East Pine St., P.O. Box 511
Deming, New Mexico

D. A. Sovell
President

June 11, 1962

"Mr. E. Morrison Herrin, President
Morrison Flying Service
Helena, Montana

"Dear Mr. Herrin:

"In regard to your inquiry on the Forest Service contract between U.S. Forest Service and Cisco Aircraft. This contract has been assigned to the Deming National Bank and we are to act as paying agents for all the obligations assumed under this contract.

"I can assure you that once the money is received from the Forest Service, we will pay all the bills submitted, without delay.

Yours very truly,

D. J. Sovell

DJS:mjb

In our prior opinion in this case we concluded that the June 11 letter from the Bank to Mr. Morrison constituted a promise by the Bank to pay Morrison out of the contract proceeds for its part in performing the contract. We had some question about consideration to support the promise. The case then stood on appeal only upon the propriety of the order granting a summary judgment in favor of the Bank and an evidentiary hearing had not been held. Although counsel now interprets our former opinion as holding that there was no consideration for the promise, we did not make a final determination of that question because the evidence on the question was not then before us. We now have all the evidence on behalf of both Morrison and the Bank in the record and we must conclude from a legal standpoint that Morrison's performance of the contract constituted a good and sufficient consideration to support the promise to pay.

The law is well settled that performance of a pre-existing duty owed by the promisee to the promisor is not a sufficient consideration. But, that is not our situation here. The contract to be performed was between Morrison and Cisco and the promise here is by a third party, the Bank, to Morrison. The performance of the contract was certainly beneficial to the Bank and Morrison suffered a detriment in going forward with performance rather than refusing to perform because of the questionable financial condition of Cisco or seeking other and extraordinary means of insuring payment prior to performance.

Without dispute, the record shows that Mrs. Herrin, President of Morrison, testified that if she had not received the June 11 letter from the Bank, she would have requested the Forest Service to pay Morrison's share of the contract proceeds direct to her instead of to Cisco.

She also testified, without contradiction, that the Forest Service had acceded to such a request on the part of another subcontractor during the performance of this same contract.

We recognize that there is a conflict among the authorities as to whether there is a sufficient consideration for a promise by a third person made to induce a party to an existing contract to perform.[4] Professor Corbin recognizes this conflict and his comment about it has the approval of this court.[5] We believe not only that the trend of recent decisions but the "weight of authority" now compels us to follow the rule enunciated by the American Law Institute in Restatement, Contracts, § 84, "Consideration is not insufficient because of the fact * * * (d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act in furtherance given or promised as consideration."

Professor Corbin quotes this section of the Restatement with approval and makes the following comment:

> "This should be supported for two reasons: (1) The promisor gets the exact consideration for which he bargains, one to which he previously had no right and one that he might never have received; (2) there are no sound reasons of social policy for not applying

4. 17 Am. Jur. 2d, Contracts, § 123 and footnote 13.

5. Corbin, Contracts, § 176, states:

> "If an actual count of cases is made, from the earlier centuries down to date, the greater number have been decided against the promisee. The performance of his duty to a third person was held not to be a sufficient consideration. Nevertheless, this should not now be called the 'weight of authority.' To the numerous cases to the contrary, holding such performance a sufficient consideration, must be added much critical juristic opinion, the Restatement by the American Law Institute, and the fact that many recent decisions are on this side. In spite of past decisions, no state or federal court need hesitate to give judgment against the promisor if the 'merits of the case' seem to require it."

> in this case the ordinary rules as to sufficiency of consideration. The performance is bargained for, it is beneficial to the promisor, the promisee has forborne to seek a rescission or discharge from the third person to whom the duty was owed, and there is almost never any probability that the promisee has been in position to use or has in fact used any economic coercion to induce the making of the promise. There is now a strong tendency for the courts to support these statements and to enforce the promise. The reasons that may be advanced to support the rule that is applied in the two-party cases, weak enough as they often are in those cases, are scarcely applicable to all in three-party cases." Corbin, Contracts, § 176.

In its Second Amended Complaint Morrison sought to impress a lien upon the contract proceeds in the hands of the Bank and we have no difficulty with this point here. The facts of this case fit perfectly with the recognized principle of equitable liens. That term has been defined as a right, not existing at law, to have specific property applied in whole or in part to the payment of a particular debt or class of debts. "Such a lien may be created by express contract which shows an intention to charge some particular property with a debt or obligation, or it may arise by implication from the relations and dealings of the parties whose interests are involved."[6] Without any doubt, the two letters exchanged between Morrison and the Bank constituted an express agreement that the Bank would pay Morrison for the performance of the contract out of the contract proceeds to be received by the Bank from the Forest Service. At a time no later than upon receipt of these proceeds by the Bank an equitable lien attached to such contract proceeds.

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6. Am. Jur., Liens, § 18, and see cases cited in footnote 8, infra.

The next issue to be determined is the validity of the trial court's determination that 28 U.S.C. § 1655[7] was not applicable. Basically section 1655 is a venue provision allowing suits to be brought in rem to enforce a lien or claim on or remove any encumbrance or lien or cloud upon the title to real or personal property within the district where the suit is brought. Initially the allegations in the complaint must be examined to determine whether section 1655 is applicable. From these allegations must be extracted the legal theory of the plaintiff's cause of action to determine whether it is a proceeding in rem to enforce a lien or claim upon real or personal property. If coverage exists from these allegations it is clear that jurisdiction obtained over non-resident parties pursuant to the provisions of 1655 continues even though it subsequently develops that the plaintiff's allegations and claims were non-meritorious. Shuford v. Anderson, 10 Cir., 352 F.2d 755, Cf.

7. 28 U.S.C. § 1655 states:

"In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

"Such order shall be served on the absent defendant personally, if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

"If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the state, but any adjudication shall, as regards the absent defendant, without appearance, effect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

"Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just."

Bell v. Hood, 327 U.S. 678. Significantly in the instant case if appellant's Amended Complaint alleged a cause of action which fit within 1655 giving jurisdiction over the non-resident defendants, Cisco and National City Aircraft Leasing Co. then the default judgment entered against these defendants must stand.

The district court based its determination of lack of coverage under 1655 on the finding that no antecedent lien existed. Appellant argues that this represents too narrow a construction of section 1655 in that it covers not only "liens" but "claims made against property." While this is certainly true it is doubtful that the district court's statement should be interpreted so narrowly. The term "antecedent lien" was undoubtedly used by the district court to include equitable liens and claims as well as contractual or statutory liens.

Appellant argues that two separate bases exist for applying section 1655. First, the action is to enforce a constructive trust on a fund with a situs in New Mexico and the Tenth Circuit Case of Shuford v. Anderson, 10 Cir., 352 F.2d 755, established the proposition that an action to establish a constructive trust on a specific piece of property comes within section 1655. Two arguments are raised by appellee, Deming National Bank, to distinguish Shuford v. Anderson. First, it contends that the Amended Complaint did not sufficiently allege a constructive trust. This issue was, however, decided by this court on the prior appeal wherein it was stated "Morrison may be able to prove a case under some legal theory other than guaranty. Its proposed theories of promissory estoppel and constructive trust are sufficiently alleged in the complaint and they, or some other legal or equitable theory, may find factual support from evidence available * * *." Morrison Flying Service v. Deming National Bank, 340 F.2d 430 at 432. Ap-

pellee's second argument also fails. It rightfully claims that the Shuford case recognizes the requirement that "the proceeding must be in aid of some pre-existing claim, existing prior to the suit in question and not a proceeding to create for the first time a claim to property as the effect of the proceedings itself." In the Shuford case the claim was deemed to be pre-existing because it was based upon an agreement between the plaintiff and defendant. In that case the plaintiff, Shuford, sued the defendant, Anderson, to have the defendant declared a construc 've trustee of various property. The defendant had allegedly applied funds given him by Shuford in furtherance of a joint adventure agreement to the retiring of a second mortgage owing against certain real property. The agreement stipulated that "each would have a share in the securities given to either or both of them by the corporation and co-partnership as a consideration for their investment." Id. at 758. This court stated, "The complaint in this case, apart from any other theory presented by it, expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the complaint. All of the other allegations in a sense orbit around this alleged agreement. Such an agreement, as sustained by the proof, would clearly create an interest in the land, subject to protection by a local action. The extent and the nature of the interest would depend upon other allegations or upon legal implications from the relationship of the parties, but the claim would be created by a pre-existing agreement and not merely by the adjudication of the court." Shuford v. Anderson, supra, at 760-761.

In appellant's Amended Complaint it is alleged that appellee Deming National Bank has in its possession approximately $11,000.00 of the fund received from Cisco. Appellant further alleges that it has a prior claim to such

funds because of appellee's promise to make payment therefrom. Included with the complaint are the documents, the assignment to Deming National Bank and the June 11th letter to Mrs. Herrin, containing the promise to pay from the funds to be collected from Cisco. We hold that this sufficiently alleges and establishes an equitable lien upon the fund held by Deming[8] to satisfy the requirements set forth in Shuford v. Anderson, supra, for an antecedent lien.

The second ground upon which appellant relies for the assertion that section 1655 applies to the instant situation is that the action is an attempt to nullify a fraudulent conveyance, i.e., the assignment to National City Aircraft Leasing Co., and apply a fund to a creditor's action. The Seventh Circuit in two recent cases, Huntress v. Huntress' Estate, 7 Cir., 235 F.2d 205, and Graff v. Nieberg, 7 Cir., 233 F.2d 860, concerning situations indistinguishable from the instant case, held that 1655 applied. As we found the first ground set forth by appellant to be sufficient to support his allegation that 1655 applied, a full discussion of his second ground is not required. We, therefore, believe that the trial judge erred in holding 1655 not applicable to appellant's causes of action. Since 1655 applied the court had jurisdiction to enter default judgment against Cisco and National City Aircraft Leasing Co. severing their rights to the fund held by Deming National Bank.

The final question concerns the priority of the United States' tax liens. The government's arguments are based on the proposition that appellant was a general, unsecured creditor. As discussed above, however, we determine that appellant had a valid equitable lien upon the funds de-

8. See Caldwell v. Armstrong, 10 Cir., 342 F.2d 485; Porter v. Searle, 10 Cir., 228 F.2d 748; and Union Trust Co. v. Townshend, 4 Cir., 101 F.2d 903.

posited in the Deming National Bank. Since this lien is based upon the contract for payment from the Bank, appellant qualifies as having a security interest as defined by 26 U.S.C. § 6323(h)(1).[9] Subsection (a) of § 6323 states: "The lien imposed by section 6321 shall not be valid as against any * * * holder of a security interest * * * until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate." It is undisputed that the earliest of the government's liens was not filed until 1963 which is after the latest date when appellant's security interest could be said to perfect, i.e., the depositing of the money in Deming National Bank on November 24, 1962. The government's contention that it should be awarded priority over appellant's claim to the fund held by Deming is therefore without merit.

The judgment appealed from is REVERSED and the case is REMANDED with directions to reinstate the default judgments entered against Cisco Aircraft, Inc., and National City Aircraft Leasing Company, and to enter a judgment in favor of appellant and against appellee Bank, in the amount of appellant's claim, including interest from December 24, 1962, and further adjudging that appellant has a prior equitable lien upon the contract proceeds held by the Bank, the same to be applied to the satisfaction of appellant's judgment against appellee Bank.

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9. 26 U.S.C. § 6323(h)(1) states: "Security interest.—The term 'security interest' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth."

FILED
NOV 18 1968

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 692

DEMING NATIONAL BANK, a National Banking Corporation,
Petitioner,

vs.

MORRISON FLYING SERVICE, a Montana Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Argument 5

1. Petitioner Has No Standing to Complain of the Court of Appeals' Interpretation of Section 1655 .. 6

2. There Is No Real, Existing Conflict in the Circuits on the Point Decided by the Court of Appeals 6

3. The Decision Below Is Clearly Correct 9

Certificate of Service 11

Citations

Cases

American Fire & Casualty Co. v. *Finn*, 341 U.S. 6, 71 Sup. Ct. 534, 95 L.Ed. 702 6

Dan Cohen Realty Co. v. *National Savings & Trust Co.*, 6 Cir. 1942, 125 F.2d 288 8

Shuford v. *Anderson*, 10 Cir. 1965, 352 F.2d 755, cert. den., 383 U.S. 935 7-8

Statutes and Miscellaneous Authorities

28 U.S.C., Section 1254(1) 2

28 U.S.C., Section 1655 ..... 6 7, 8

Corbin, *Contracts*, Section 176 9

Restatement of Contracts, Section 84 9

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OPINIONS BELOW

The references to the opinions of the United States district court and of the court of appeals have been correctly stated by the petitioner, and they are accurately reproduced in Exhibits "A," "B" and "C" attached to the petition.

JURISDICTION

Respondent agrees with petitioner that this Court has *jurisdiction* to review the judgment by writ of certiorari, but not for the reasons advanced in the petition. The latter appear to be arguments as to why petitioner feels that the Court should exercise its jurisdiction, and we agree with none of them, for the reasons hereafter set forth.

We submit that the Court has jurisdiction of this proceeding by virtue of 28 U.S.C., Sec. 1254(1), but that no justification exists for its exercise in this instance.

QUESTIONS PRESENTED

We submit that the following questions are more appropriate for this Court's consideration than those presented in the petition.

1. Is petitioner entitled to review of a decision which works to its advantage, and which, if reversed, would increase its personal liability under the judgment?

2. Is any real, existing conflict among the circuits shown by the application of a uniform construction of a statute, upon different factual situations, to achieve a different result?

3. Is there a conflict of sufficient importance where, if it exists at all, it arises under a decision over twenty-five years old?

STATEMENT OF THE CASE

Respondent, Morrison Flying Service, entered into a subcontract with Cisco Aircraft, Inc., under which the former agreed to provide search planes and pilots at specified rates to assist the latter in performance of its prime

contract for spraying forests for the United States government. The contract provided that Morrison would be paid within forty-eight hours after the contract proceeds were received from the government by Cisco.

The financing of Cisco's operations was undertaken by the petitioner, Deming National Bank, with knowledge that two of the bank's stockholders and directors were personally involved in these operations. These individuals were personally obligated on Cisco's performance bond given to the United States, and they had procured, for a fee, the corporate surety on this bond. They were also sureties on Cisco's note to the bank. With this knowledge, the bank took an assignment from Cisco of the proceeds to which it would become entitled after performance of the contract. Upon learning of this development, and after Cisco advised that the bank would pay her bill, Mrs. Herrin, president of Morrison, requested the bank to assure payment for her services under the contract. The bank replied, advising that it was Cisco's paying agent, and that it would pay all bills after the contract proceeds were received. The correspondence is set forth in petitioner's statement of the case.

Respondent performed its part of the contract only after receiving these assurances from the bank, and would not have done so otherwise. Other means of assuring payment were available to respondent, but these were deemed unnecessary because of the bank's letter.

A few days after completion of the contract, Mr. Monroe, president of Cisco; Mrs. Herrin, president of Morrison; and a government representative met in Helena, Montana, and agreed as to the number of hours flown and as to the amount Morrison would receive from the proceeds of the contract. An itemized statement containing

this information, including the amount due, was addressed to the bank, signed by Mrs. Herrin on behalf of Morrison, and by Mr. Monroe on behalf of Cisco, and mailed to the bank. Several weeks later another document was received by the bank, purporting to be an assignment from Cisco to National City Aircraft Leasing Co. of the proceeds due from the government. This document also purportedly authorized the bank to reimburse itself and to pay the bond premium to the company owned by the bank directors referred to above.

Later, on October 1, 1962, Morrison's attorney inquired of the bank as to when Morrison could expect payment of its portion of the contract proceeds. The bank replied on October 9, 1962, advising that the bank had no control over the funds. On October 15, Morrison's attorneys replied, reminding the bank that the statements in its last letter were contrary to those contained in its letter of June 11, when it advised that the bank was paying agent for Cisco and that all bills would be paid when they received the government payment. The October 15 letter also further advised the bank that if it did not pay Mrs. Herrin's bill, suit would be brought against it for that amount.

Although thus informed of the adverse claims upon the contract proceeds, the bank took no action to interplead the claimants or to deposit the funds in court after they were received. These funds were received by the bank on December 24, 1962, and immediately thereafter disbursed, by payment to the bank of principal, interest and "service charges" on the loan; $3,168.75 to the company owned by the bank directors, in payment of the bond premium; and $8,536.74 to National City Aircraft Leasing Co. The balance in the sum of $11,999.25 was retained by the bank and invested as a part of its capital. There is no question about the fact that the bank has no interest in this fund.

Plaintiff's amended complaint asserted in count one a claim for judgment against the bank in the full amount of its bill. The second count of the complaint asserted plaintiff's interest in the undisbursed fund held by the bank; it was asserted that defendants National City Aircraft Leasing Co. and Cisco Aircraft, Inc., had no rights in the fund as against those of the plaintiff, and subsequent pleadings also raised the issue as to the priority of plaintiff's rights as against those of the United States government on tax liens assessed against Cisco. The decision of the court of appeals, as reflected in the judgment entered upon the mandate, found the bank personally liable to the plaintiff for the full amount of plaintiff's bill; also found that plaintiff had an equitable lien upon the undisbursed fund, which was superior in right to that of the United States, and that the bank could apply this fund to the satisfaction of the judgment.

ARGUMENT

Attention should first be directed to certain statements made on page 12 of the petition. Petitioner asserts that no proper service of process was ever accomplished against the defendants Cisco Aircraft, Inc., and National City Aircraft Leasing Co. These statements are incorrect. It is true that the record transmitted to the court of appeals by the district court clerk did not contain the affidavit for publication of summons against Cisco Aircraft, Inc., and the return of service of the summons upon National City Aircraft Leasing Co. The clerk does not ordinarily do so unless a question of proper service is raised. These documents have since been certified by the clerk of the district court and transmitted to this Court. They demonstrate that there was proper service against each of these defendants and that proof of such service was filed before the default judgments were entered.

1. Petitioner Has No Standing to Complain of the Court of Appeals' Interpretation of Section 1655.

Petitioner's only real argument for review by this Court is that a conflict exists among the circuits with respect to Section 1655. Curiously, the resolution of that supposed conflict in the manner suggested by petitioner would result in increasing its personal liability to respondent by the sum of $11,999.25.

The judgment entered upon the mandate of the court of appeals, which was approved as to form by petitioner and which clearly reflects the terms of the mandate, awards judgment in favor of respondent and against petitioner personally in the sum of $14,424.81. The judgment further provides, however, that petitioner can apply toward the partial satisfaction of this judgment, the undisbursed $11,000 fund. This latter provision of the judgment arose as the result of the court of appeals' determination that Section 1655 was properly applied, and that the government lien upon the fund was inferior to the lien of the respondent. If petitioner were to succeed on its main point in this proceeding, the judgment would remain intact but it would have to be paid entirely out of the bank's own funds. This alone should defeat the petition. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 71 Sup. Ct. 534, 95 L.Ed. 702.

2. There Is No Real, Existing Conflict in the Circuits on the Point Decided by the Court of Appeals.

Petitioner contends that the decision below has construed 28 U.S.C., Sec. 1655, to permit a general creditor to utilize its provisions in an in personam action, without asserting a pre-existing lien or claim to property. Counsel then contend that this is the rule in the seventh and tenth circuits, and that a contrary rule prevails in the second,

fourth, fifth and sixth circuits. Cases from all of these circuits are cited by petitioner, supposedly supporting these contentions.

Petitioner has misinterpreted the opinion below. The court of appeals held, with respect to count two of the amended complaint, that the plaintiff had pleaded and established by sufficient evidence that it was the owner of an equitable lien upon the undisbursed fund held by the bank, and that this was an antecedent lien within the purview of Section 1655. We quote portions of the opinion reproduced at pages A20 to A22 of the petition:

> "The district court based its determination of lack of coverage under 1655 on the finding that no antecedent lien existed. Appellant argues that this represents too narrow a construction of section 1655 in that it covers not only 'liens' but 'claims made against property.' While this is certainly true it is doubtful that the district court's statement should be interpreted so narrowly. The term 'antecedent lien' was undoubtedly used by the district court to include equitable liens and claims as well as contractual or statutory liens.
>
> * * *
>
> "In appellant's Amended Complaint it is alleged that appellee Deming National Bank has in its possession approximately $11,000.00 of the fund received from Cisco. Appellant further alleges that it has a prior claim to such funds because of appellee's promise to make payment therefrom. Included with the complaint are the documents, the assignment to Deming National Bank and the June 11th letter to Mrs. Herrin, containing the promise to pay from the funds to be collected from Cisco. We hold that this sufficiently alleges and establishes an equitable lien upon the fund held by Deming to satisfy the requirements set forth in Shuford v. Anderson, supra, for an antecedent lien."

Petitioner similarly misconstrues the other tenth circuit decisions. By way of illustration we quote from *Shu-*

ford v. *Anderson*, 10 Cir. 1965, 352 F.2d 755, 760, cert. den., 383 U.S. 935:

> "The complaint in this case, apart from any other theory presented by it, expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the complaint. All of the other allegations in a sense orbit around this alleged agreement. Such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action. The extent and the nature of the interest would depend upon other allegations or upon legal implications from the relationship of the parties, but the claim would be created by a pre-existing agreement and not merely by the adjudication of the court."

The seventh circuit decisions cited by petitioner both held that Section 1655 may be utilized in an action to set aside a fraudulent conveyance without first reducing the claim to judgment. While these cases were discussed in the court of appeals' opinion, they were neither approved nor disapproved by that court. Thus they afford no basis for review in this proceeding.

We submit that the supposedly contrary cases cited by petitioner are not in conflict with the court of appeals' decision in this case. To some extent the older cases contain statements indicating that a different result might have obtained if these particular facts had been presented to the courts at the time those decisions were rendered. This is far from certain, however, and the most recent of those cases was decided in 1942. *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 6 Cir. 1942, 125 F.2d 288. We submit that a mere possibility of conflict between cases decided over twenty-five years apart can hardly be termed a real, existing conflict between the circuits.

3. The Decision Below Is Clearly Correct.

The court of appeals held that the bank's letter dated June 11, 1962, constituted a promise to pay plaintiff's bill. The promise was found to be supported by consideration, in that performance on the part of the plaintiff was both detrimental to it and beneficial to the bank. It was noted that Mrs. Herrin refrained from taking alternative action to protect herself, because of the bank's promise, and that she would otherwise have done so, with probable success. To the argument that plaintiff was already bound to perform under the contract with Cisco, the court of appeals cited the *Restatement of Contracts*, Section 84, and Corbin, *Contracts*, Section 176. We quote a portion of the opinion reproduced at page A17 of the petition:

> "We recognize that there is a conflict among the authorities as to whether there is a sufficient consideration for a promise by a third person made to induce a party to an existing contract to perform. Professor Corbin recognizes this conflict and his comment about it has the approval of this court. We believe not only that the trend of recent decisions but the 'weight of authority' now compels us to follow the rule enunciated by the American Law Institute in Restatement, Contracts, § 84, 'Consideration is not insufficient because of the fact * * * (d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act in furtherance given or promised as consideration.'"

The conclusions reached by the court of appeals on the merits of this case are fully supported by the equities. Plaintiff's right to recovery is also justified on grounds of constructive trust and promissory estoppel. One cannot help but conclude, from the evidence, that the bank's actions in persuading plaintiff to perform the contract and in refusing payment after performance, were motivated by a

desire to protect the interests of the bank stockholders and directors who were personally involved in Cisco's operations. Although its June 11 letter gave a contrary impression, the bank withheld information as to its lack of power over the funds until plaintiff had fully performed. It paid no attention to the signed statement by Cisco as to the amount of plaintiff's bill, but attached considerable importance to a subsequent assignment of the proceeds from Cisco to National City Aircraft Leasing Co. It disbursed the proceeds of the government contract to persons other than the plaintiff, including itself and the aforementioned stockholders of the bank, with full knowledge of plaintiff's claim upon the fund. It has vigorously contested plaintiff's right to the undisbursed portion of the fund, even though it admittedly has no interest therein.

In conclusion, it is submitted that this case is one which was decided on its own particular facts, that there is no substantial federal question which will control future decisions, and that, for these reasons also, certiorari should be denied.

Respectfully submitted,

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JAMES T. MARTIN, JR.
201 East Griggs Avenue
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, A. W. Scribner, do hereby certify as counsel for respondent herein, that on the ..... day of November, 1968, I served the foregoing brief of respondent in opposition upon the petitioner by mailing a copy thereof, first class postage prepaid, to Benjamin M. Sherman, counsel for petitioner, at his office address, 210 South Silver Avenue, Deming, New Mexico 88030.

Dated this ..... day of November, 1968.

.....

A. W. SCRIBNER